IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 104

PARMELEE TRANSPORTATION CO.,
Appellant-Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., et al.,
Appellees-Respondents.

On Appeal from and Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR APPELLANT-PETITIONER, PARMELEE TRANSPORTATION CO.

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OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 136 F. Supp. 476. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 240 F. 2d 930.

STATUTORY BASIS FOR JURISDICTION.

The jurisdiction of this Court to review on appeal the judgment of the Court of Appeals for the Seventh Circuit is conferred by 28 U.S.C. § 1254 (2).

The judgment of the United States District Court for the Northern District of Illinois was entered on January 12, 1956. (R. 160) The judgment of the United States Court of Appeals for the Seventh Circuit, review of which is sought here, was entered on January 17, 1957. (R. 212) Petitions for rehearing were denied by the latter Court on February 20, 1957. (R. 213)

MUNICIPAL CODE OF CHICAGO CHAPTER 28.

The provisions of Chapter 28 of the Municipal Code of Chicago are set forth in the Appendix to this Brief, at pp. 1a to 18a.

QUESTIONS PRESENTED.

The following questions are presented by this appeal and petition:

1. Whether the judgment entered by the Court of Appeals in this case is appealable under 28 USC § 1254 (2)?

2. Whether the appellant-petitioner has standing to maintain this appeal and petition for certiorari?

3. Whether the Court of Appeals erred in holding that the City of Chicago could not constitutionally require the appellee-respondent, Railroad Transfer Service, Inc., a non-certificated motor carrier engaged primarily in interstate commerce wholly within the City of Chicago, to secure a license in order to use the public streets and highways within that city, where the license requirement was a means of effectuating a plan of regulation relating to traffic control, public safety, and maintenance of the streets and highways within the City of Chicago?

4. Whether the Court of Appeals erred in gratuitously anticipating a constitutional question by not requiring the

appellee-respondent, Railroad Transfer Service, Inc. to exhaust its administrative remedies by applying for a license as required by the Municipal Code of the City of Chicago, §§ 28-1 through 28-32?

5. Whether the Court of Appeals erred in imputing improper motives to the City Council of the City of Chicago in order to hold that the ordinance in question was unconstitutional as applied to the appellee-respondent Railroad Transfer Service, Inc.?

6. Whether the Court of Appeals erred in substituting its judgment for that of the City Council of the City of Chicago with respect to whether the licensing of motor vehicles performing transfer services within the City of Chicago was an appropriate means of effectuating the police power of the City of Chicago, exercised for the purpose of controlling traffic, effecting public safety and maintaining streets and highways within the City of Chicago?

STATEMENT OF THE CASE.

This is an action brought by the appellees-respondents railroad companies and Railroad Transfer Service, Inc. (hereinafter sometimes referred to as "Transfer") for a declaratory judgment that Chapter 28 of the Municipal Code of Chicago is inapplicable to the transfer service activities carried on by the appellee Transfer in Chicago and for an injunction to prevent the officials of the City of Chicago from enforcing the ordinance. The jurisdiction of the United States district court was invoked under 28 U.S.C. §§ 1331, 1337. The United States district court held that the ordinance was applicable to the activities of Transfer in the City of Chicago and that the ordinance as so applied was constitutional. It granted appellant's motion for summary judgment to that effect. 136 F. Supp.

476. The United States Court of Appeals for the Seventh Circuit held that the ordinance was applicable to the activities of Transfer which were carried on in the City of Chicago, but ruled that the ordinance as so applied violated the Commerce Clause of the United States Constitution. Article I, Section 8, Clause 3.

The facts are not in dispute.

In the central business district of Chicago there are eight railroad passenger terminals, each of which is used by one or more of the twenty-one terminal lines serving the city. None of the terminal lines operates through the city. A through passenger (*i.e.*, one whose journey both begins and ends at points other than Chicago) travels on an interline ticket and must change trains at Chicago. When the incoming line and the outgoing line use different terminals, arrangements have been made for the transportation of through passengers and their baggage from one terminal to another. Basically, such transportation constitutes the "terminal services" which are involved in this case, although in a broader sense "terminal services" includes also transfer between railroad terminals and steamship docks, and between terminals or docks and other points in the central business district. Ninety-nine percent of the passengers using these transfer services are traveling in interstate commerce.

The railroads have undertaken to arrange transfer services in Chicago instead of leaving it to the passenger to make his own arrangements for getting from one terminal to another. They have, at least since 1916, published tariffs permitting the inclusion of the transfer service in the fare, and the normal practice is to include in the interline ticket a coupon entitling the passenger to transfer between terminals. In modern times the only practicable means of transfer has been by motor vehicle operating on the streets

of Chicago, and the railroads have contracted with motor carriers to provide the service.

For more than a century prior to 1955, transfer services were provided by Parmelee Transportation Company and its predecessors. *Status of Parmelee Transportation Company*, 288 I.C.C. 95 (1953). The vehicles employed have always been regarded as public passenger vehicles for hire, and have been regulated by the City of Chicago under a comprehensive scheme for the regulation of such vehicles. While Parmelee supplied the services it operated in compliance with the regulations prescribed by the City, and the validity of those regulations was not questioned.

It is important to summarize the regulatory situation as it existed in 1955.

Chapter 28 of the Chicago Municipal Code dealt with public passenger vehicles generally, and specifically with livery vehicles, sight-seeing vehicles, taxicabs, and terminal vehicles. A terminal vehicle was defined as "a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations." (Section 28-1.) Section 28-2 prohibited the operation of any vehicle for the transportation of passengers for hire on the streets of the city unless it was licensed by the City as a public passenger vehicle.

Section 28-4 provided that no vehicle should be licensed until, after inspection by the public vehicle license commissioner, it had been found to be in safe operating condition and to have adequate body and seating facilities.

Section 28-4.1 conditioned the license on compliance with further specifications for safety, relating to the adequacy of doors and aisle space.

Section 28-5 required the application for a license to be in writing and to give certain information concerning the applicant and the vehicle to be licensed.

Section 28-6 required the commissioner to investigate the "character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation" of the vehicle.

Section 28-7 imposed an annual license fee.

Section 28-12 required proprietors of public passenger vehicles to carry public liability and property damage insurance and workmen's compensation insurance, with solvent and responsible insurers approved by the commissioner. The amount of insurance to be carried and certain provisions of the policy were specified. Policies were required to be filed with the commissioner, and provision was made for the filing of an acceptable surety bond in lieu of insurance.

Section 28-13 required the payment of all judgments arising from operation of the vehicle to be paid within 90 days, irrespective of indemnity from insurance.

Section 28-14 provided for suspension of the license if, in the judgment of the commissioner, a vehicle was found unfit for use.

Section 28-15 specified various grounds for license revocation.

Section 28-31 provided:

> "No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in [the central business district]."

Section 28-32 provided fines for the violation of any provision for which another penalty was not specified, and declared that each day of continuance of a violation should be a separate offense.

On June 13, 1955, the railroads notified Parmelee of their decision to terminate its contract for the furnishing of transfer services effective September 30, 1955. The railroads entered into a new contract for the supply of these services with Transfer, a corporation organized for the purpose.

On July 26, 1955, the City Council amended Chapter 28 of the Municipal Code and effected certain changes in the provisions relating to terminal vehicles. The amendment was in three parts:

(1) The definition of "terminal vehicle" in Section 28-1 was broadened so as to eliminate the reference to contracts with railroad and steamship companies.

(2) Section 28-31 was amended to drop the requirement that, to be eligible for a terminal vehicle license, a person must have a contract with one or more railroad or steamship companies.

(3) A new section (28-31.1) was added. Its importance in this action requires that it be set out in full:

"28-31.1. Public Convenience and Necessity. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public con-

venience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

"In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

"1. The public demand for such service;

"2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;

"3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;

"4. Any other facts which the commissioner may deem relevant.

"If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner."

Transfer began operations, under its contract with the railroads in October, 1955, but never applied for public passenger vehicle licenses as required by Chapter 28 of the Municipal Code. On the contrary, it took the position that the ordinance did not apply to its operations under its contract with the railroads, and that, if the ordinance did apply to such operations, it was void as an attempt to regulate interstate commerce. The City having indicated its intention to enforce the ordinance against Trans-

fer, the railroads and Transfer on October 24, 1[illegible], filed their complaint against the City and its officials in the United States District Court for the Northern District of Illinois, seeking an injunction and a declaration that the ordinance was inapplicable or, in the alternative, that the ordinance was void as applied to the plaintiffs. Jurisdiction was invoked under Section 1331 of the Judicial Code, the requisite jurisdictional amount being in controversy, and under Section 1337.

On November 10, 1955, the district court entered an order permitting Parmelee to intervene as a defendant under the provisions of Rule 24 (b), Federal Rules of Civil Procedure.

On November 17, 1955, the City moved for summary judgment and on January 12, 1956, the court, finding no genuine issue of fact involved, entered its order of summary judgment in favor of the defendants and dismissed the action. The court had filed a memorandum opinion on December 12, 1955. On January 12, 1956, concurrently with its judgment order, the court filed a supplemental memorandum together with findings of fact and conclusions of law. The court held that the ordinance was applicable to Transfer, and that it was a proper exercise of police power by the City in the interest of public safety, health and welfare.

On January 13, 1956, the plaintiffs gave notice of appeal. On January 17, 1957, the United States Court of Appeals for the Seventh Circuit filed its opinion and order reversing the judgment of the district court and remanding the cause for further proceedings. The decision of the Court of Appeals was rested squarely on the invalidity of the ordinance under the Federal Constitution and laws.

On February 20, 1957, the Court of Appeals denied petitions for rehearing filed by the City and Parmelee, respectively.

On May 27, 1957, this Court entered an order postponing the question of jurisdiction to the hearing of the case on the merits and inviting argument on the questions: 1) whether Parmelee "has standing to seek review here on appeal or by writ of certiorari"; and 2) "Whether the judgment of the Court of Appeals is 'final' so as to permit review by way of appeal under 28 U.S.C. § 1254 (2)." 353 U.S. 971.

SUMMARY OF ARGUMENT.

1. The judgment of the court of appeals is an appealable order pursuant to § 1254 (2). This Court was in error in the *Slaker* case in holding that the "final judgment" rule was applicable to appeals under this section. *Slaker* v. *O'Connor,* 278 U.S. 188 (1929). Neither the language of the statute, its history, its purpose, nor the policy of limiting the business of this Court supports such a decision.

In any event, the judgment of the court of appeals in this case was a final order. Nothing remains to be done in this litigation except for the entry of judgment in the district court on the basis of the court of appeals' opinion. The motion for summary judgment in the district court effectively eliminated any questions of fact. All legal issues between the parties have been resolved.

2. Parmelee's standing to maintain this appeal is established by *Frost* v. *Corporation Commission,* 278 U.S. 515 (1929). Parmelee is a licensed transfer service seeking to prevent unlawful competition by Transfer. Transfer's competition is unlawful because of its failure to secure a license from the City of Chicago. The decisions of this Court since the *Frost* case recognize its continued vitality.

3. We concede that the City of Chicago has no power to impose economic regulations on a carrier engaged in

interstate commerce as a condition for granting a license. We concede, too, that the City of Chicago is without authority to require a license as a condition to operations by any carrier certificated by the Interstate Commerce Commission. But the license requirements imposed on Transfer do not involve economic regulation and Transfer is not, and can not be, a certificated carrier. The instant case is on all fours with *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28 (1939), aff'd on appeal, 309 U.S. 620 (1940). The ruling in the *Columbia Terminals* case is in accord with all the recent decisions of this Court to the effect that a state does have power to impose a license requirement on a non-certificated carrier in interstate commerce in furtherance of its exercise of police powers with regard to matters not covered by federal law or regulation. In the instant case, the activities of Transfer are not subject to any existent I.C.C. regulations which would conflict with the requirements imposed by the City of Chicago. In fact, the I.C.C. regulations specifically leave to local authorities the regulation of matters covered by the City ordinance in question here. The ordinance is, therefore, valid and enforceable.

4. Transfer is not entitled to attack the validity of the ordinance without first having applied for a license. Until the City has acted on the application for a license there is no basis for urging, as Transfer does, that the license would be denied on unconstitutional grounds. In rejecting the interpretation of the ordinance by the city officials that economic conditions would not be imposed on Transfer under the ordinance and in presuming that the ordinance would be unconstitutionally applied, the court of appeals judgment is in conflict with the decisions of this Court.

5. By failing to make application for a license, Transfer asked the federal courts to decide a constitutional issue

which need never have arisen, except for the failure of Transfer to exhaust its administrative remedies.

6. The court of appeals erroneously imputed improper motives to the City Council of Chicago in passing the ordinance in question and on the basis of that imputation held the ordinance invalid. This Court has held since *Fletcher* v. *Peck*, 6 Cranch 87, that the validity of state legislation may not be determined on the basis of the motives of legislators.

7. In taking the position that no governmental control over the number of terminal vehicles in operation in the City of Chicago was necessary in order to avoid traffic congestion, protect the safety of the public, and preserve the streets of the City, and that the license was not a necessary sanction for the implementation of the city's legitimate police powers, the court of appeals assumed to substitute its judgment for that of the City Council. This it cannot do consistently with the mandates of this Court.

ARGUMENT.

I.

THE JUDGMENT ENTERED BY THE COURT OF APPEALS IN THE INSTANT CASE IS APPEALABLE UNDER 28 U.S.C. § 1254(2).

A. A final judgment should not be a jurisdictional prerequisite to an appeal from a judgment of a United States Court of Appeals in a case in which that court has held a state statute in violation of a provision of the federal constitution.

It is respectfully submitted that this Court has heretofore been mistaken in reading into 28 U.S.C. § 1254(2) and its predecessor a requirement of finality for review of a court of appeals judgment holding a state statute invalid because in conflict with a provision of the federal Constitution. *Slaker* v. *O'Connor*, 278 U.S. 188 (1929); *South Carolina Electric and Gas Co.* v. *Flemming*, 351 U.S. 901 (1956). We seek the Court's indulgence and permission to argue this question for two reasons. First, the only case in which this Court has expressed its view on this subject since the passage of the 1925 Judiciary Act, 43 Stat. 936, 68th Cong, 2d Sess. (1925), is the *Slaker* case. The issue was not, however, presented by that case, for, as this Court stated: "The petition contained three counts none of which questioned the validity of the statute." 278 U.S. at 189. An attempt to appeal under the predecessor of § 1254(2), therefore, was wholly unwarranted and indeed, as the Court held, frivolous. Cf. Moore's Commentary on the U. S. Judicial Code, 552, 554 (1949). The issue raised here was certainly not presented to the Court by the facts of that case. Second, neither in the *Slaker* case nor in the *Flemming* case, the only other

instance in which the doctrine of finality was specifically invoked by this Court, did counsel have an opportunity to brief the question and present arguments to the Court.

The immediate predecessor of § 1254(2), with which this Court was concerned in the *Slaker* case, was the amendment to § 240(b) effected by the Judiciary Act of 1925. (We go no further back in the history of this section for the reason that this Court's jurisdiction was thoroughly revised by the 1925 Act and the distinction between its discretionary jurisdiction on certiorari and its compulsory jurisdiction on appeal was made of primary importance by this Act.) The 1925 Act provided that:

> Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; . . . (43 Stat. 936, 939).

There was no mention therein of a qualification of finality, even though § 240(b) was added in the course of debate in the Senate and was inserted to parallel the provision for appeal from judgments of State courts holding unconstitutional a federal treaty or statute, which provision did contain a final judgment requirement. See *Frankfurter and Landis, The Business of the Supreme Court,* 276-78 (1927). Indeed, the very first words of the section on which § 240(b) was patterned make the finality of the judgment a prerequisite to review. The relevant portions of that section read as follows:

> A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a

> treaty or statute of the United States, and the decision is against its validity; . . . may be reviewed by the Supreme Court on a writ of error. (43 Stat. 936, 937.)

Thus, there can be no doubt that the legislators were cognizant of the final-judgment requirement and knowingly omitted it from the amended § 240(b). The only rational conclusion to be drawn from this legislative history is that a final judgment was not made a prerequisite to review under § 240(b).

When Congress recodified the Judicial Code in 1948, once again the right of appeal from state courts was specifically made dependent on the existence of a final judgment. 28 U.S.C. § 1257. But no such qualification was attached to appeals taken pursuant to § 1254(2):

In the Congressional scheme for review of decisions of courts of appeals by this Court—and it is to be remembered that the Constitution charges Congress with the duty to regulate this Court's appellate jurisdiction—Congress has nowhere imposed a final-judgment requirement. See 28 U.S.C. § 1254(1) (certiorari); § 1254(3) (certificate); § 1252 (appeals from judgments holding federal statutes unconstitutional). And in no other instance has this Court read such a requirement into the statute. It is respectfully submitted that there is no reason why such a qualification should be read into § 1254 (2).

The very same policy underlying review as a matter of right by this Court of decisions adverse to the constitutionality of a federal statute—a review which is not qualified by a final-judgment rule—underlies the grant of review as a matter of right in § 1254(2) cases. Indeed, the necessity for operating the federal system with as little conflict as possible between the states and the nation would suggest that Supreme Court intervention is more

readily required in § 1254(2) cases than in those instances in which a federal court has ruled against the validity of a federal statute.

The only policy argument against review of non-final orders in these cases must be premised on the necessity for husbanding the energies of this Court, an argument which would apply to all classes of cases which this Court is authorized to review. This argument falls when it is recognized that in the thirty-odd years since the 1925 Judiciary Act, there have been very few appeals to this Court under § 1254(2). See *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, 221 (1951 ed.). And in those instances in which an appeal is sought on the basis of a frivolous argument, this Court is adequately armed to protect itself through the device of a summary affirmance.

We respectfully submit, therefore, that the requirement of finality, read into the statute by the dictum in the *Slaker* opinion, finds no basis in the language of the statute, the purpose of the statute, the Congressional scheme for review of decisions of courts of appeals by this Court, or the policy of limiting the business of the Court, and should, therefore, now be corrected.

B. The judgment below was "final" for purposes of an appeal under 28 U.S.C. § 1254(2).

In the event that the Court chooses to adhere to its requirement of a final judgment as a prerequisite to an appeal pursuant to § 1254(2), we submit that the judgment of the Court of Appeals for the Seventh Circuit was "final" within the requirements of the statute as interpreted by this Court.

As this Court has stated, "no self-imposing formula defining when a judgment is 'final' can be devised." *Re-*

public Natural Gas Co. v. *Oklahoma*, 334 U.S. 62, 67-68 (1948). In effect, however, this Court has ruled, under § 1257 and its predecessor, on which § 1254(2) is based, *Frankfurter and Landis, supra*, that a judgment or decree, in order to qualify as final, "'must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here [in this Court], the court below would have nothing to do but to execute the judgment or decree it had already rendered.'" *Georgia Ry. and Power Co.* v. *Decatur*, 262 U.S. 432, 437 (1923); see also *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 546 (1947). This requirement is met by the case at bar.

This case was instituted as an action for a declaratory judgment that the ordinance in question was inapplicable to the services rendered by Transfer, or, if applicable, was unconstitutional; and an injunction was sought to prevent the enforcement of the ordinance against Transfer by the officials of the City of Chicago. The accuracy of the relevant facts stated in the complaint was conceded, and the City moved for summary judgment on the issues raised. The United States District Court for the Northern District of Illinois held that the ordinance was applicable to the activities of Transfer and that it was constitutional as applied to those activities. 136 F.Supp. 476. This was a final judgment disposing of all of the issues raised by the case. On appeal to the Court of Appeals for the Seventh Circuit that Court held that the ordinance was applicable to the activities of Transfer but as so applied was unconstitutional. 240 F.2d 930. Once again, the judgment disposed of all the issues in the case and left nothing to be done by the District Court except to enter judgment for the plaintiffs in conformity with the judgment and opinion of the Court of Appeals.

Presumably, the doubts as to the finality of the judgment which prompted this Court to raise the question grow out of this Court's ruling in *Fountain* v. *Filson*, 336 U.S. 681 (1949). In that case, the district court had granted defendant's motion for summary judgment which rested on a defense "that New Jersey law would not permit the imposition of a resulting trust under the circumstances disclosed in the complaint and the accompanying documents." *Id.* at 682. On appeal the court of appeals "agreed that under New Jersey law no resulting trust could arise . . . ." *Ibid.* But it held also that, since the complaint contained a prayer for "general relief" and alleged facts on which recovery could be had other than on the basis of a resulting trust, defendant was not entitled to summary judgment. Without giving defendant an opportunity to litigate the issues of fact relevant to this second basis for recovery, the court of appeals ordered the district court to enter judgment for the plaintiff. The defendant made a "timely motion" before the court of appeals "for a modification of this order in order to permit a trial as to the existence of the personal obligation" on a basis other than a resulting trust. *Ibid.* That motion was denied. This Court reversed the decision of the court of appeals, holding that the defendant had a right to contest those factual issues which were not conceded by the motion for summary judgment.

In short, this Court said that where the complaint alleged two grounds for recovery and the motion for summary judgment was granted only as to one, the moving party retains the right to litigate the factual issues involved in the second ground asserted. This Court specifically reserved the question in effect raised by the case at bar: "We need not pass on the propriety of an order for summary judgment by a district court in favor of one party after the opposite party has moved for summary

judgment in its favor, where it appears that there is no dispute as to any fact material to the issue being litigated." *Id.* at 682-83.

In the case at bar, the motion for summary judgment covered all the issues which could be contested by the parties, *i.e.*, the question whether the ordinance was applicable to the activities of Transfer and, if applicable, whether the ordinance was constitutional. ". . . there is no dispute as to any fact material to the issue[s] being disputed." Both issues were resolved by both courts below. Parmelee knows of no other issues in contest between the parties. If this Court were to hold, in these circumstances, that the judgment of the court of appeals is not final, it would remain only for the case to be remanded to the district court, which could do nothing but enter a judgment for the plaintiffs in accordance with the judgment and opinion of the court of appeals. After the entry of such a judgment, an appeal could be taken to the court of appeals, which would be compelled by its previous decision to affirm the judgment thus entered. At that time Parmelee would be able to take an appeal to this Court under § 1254(2) without any question about the finality of the judgment of the court of appeals. Cf. *United States* v. *United States Gypsum Co.*, 340 U.S. 76 (1950).

It is difficult for us to believe that a final-judgment rule, the justification for which must be the husbanding of the resources of the federal judicial system, could contemplate such a profligate waste of time, money, and effort, not only on the part of the litigants, but on the part of all three levels of the federal judiciary. A final-judgment rule must rest on the proposition that this Court will not "review by piecemeal the action of a . . . court which otherwise would be within its jurisdiction," *Louisi-*

ana Navigation Co. v. *Oyster Commission of Louisiana*, 226 U.S. 99, 101 (1912), and on the proposition that this Court will not undertake to review a question which might be mooted by further action in the lower courts. This rationalization establishes the decision of the court of appeals in this case as a final judgment, for all questions which the lower courts will be called upon to resolve have been resolved, and nothing remains but the formality of entry of judgment.

Thus, this case is easily distinguishable from those cited by the Court in its order raising this jurisdictional question. In both *Slaker* and *Elemming*, the judgments of the courts of appeals required that the case be tried on its merits by the respective district courts. No such trial would result from the judgment of the court of appeals entered in the instant case. Nothing remains here for the district court but the entry of a judgment on the basis of the court of appeals' opinion. The judgment of the court of appeals thus qualifies as a final judgment for purposes of review by this Court pursuant to § 1254(2). In the event of an "affirmance [by this Court], the court below would have nothing to do but to execute the judgment or decree it had already rendered," *Georgia Ry. and Power Co*, v. *Decatur, supra.*

In similar situations, this Court has held that a judgment of the court below was final for purposes of review here. *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953) (judgment reversing dismissal of the complaint held final where defendant conceded that no other defense could be made); *cf. Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946). This case should receive similar treatment.

II.

PARMELEE HAS STANDING TO SECURE REVIEW OF THE COURT OF APPEALS' JUDGMENT BY THIS COURT BOTH ON APPEAL AND ON CERTIORARI.

The question of Parmelee's standing to maintain its appeal and petition for certiorari, like many important questions of federal jurisdiction, is one which turns largely on the "specific circumstances of individual situations." *Chapman* v. *Federal Power Commission,* 345 U.S. 153, 156 (1953). We start with the proposition that the case at bar is within the rule established by the decision in *Frost* v. *Corporation Commission,* 278 U.S. 515 (1929), except that some of the weaknesses inherent in the appellant's position in *Frost* are not present in this case.

In this case, as in *Frost,* the local authority declared the business in question (here a transfer service, in *Frost* cotton ginning) to be one which can be conducted only by those who have secured a license. Here, as in *Frost,* the appellant secured the necessary license, its competitor failed to secure a license. Here, as in *Frost,* appellant's interest is in carrying on its business without illegal competition from an un-licensed competitor. Here, as in *Frost,* the appellant is not suggesting that it is entitled to be free of competition or entitled to a monopoly, but only that others engaged in the same business comply with the same valid licensing requirements as those imposed on appellant. "Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making similar valid grants to others, it is nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to

do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights . . . . The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law." 278 U.S. at 521.

The difference between this case and the *Frost* case is that in the latter the Court held that the appellant's economic interests were adequate to confer standing to maintain the action despite the fact that the appellant was *attacking* an amendment to the statute as *invalid* under the federal Constitution. In the case at bar, the economic interest of the appellant in protecting itself against unlicensed competition is asserted in *support* of rather than in *derogation* of the statutory amendment in question. The importance of this difference is emphasized by the fact that none of the arguments urged by the dissenters against appellant's standing to sue in the *Frost* case can be urged against the appellant-petitioner in this case.

In a similar situation in which this Court was called upon to determine whether a common carrier in competition with other common carriers was "a party in interest" within the meaning of § 205(h) of the Motor Carrier Act, this Court in *Alton R. Co.* v. *United States*, 315 U.S. 15, 18-20 (1942) said:

> "We are met at the outset with the question of the standing of the appellant railroad companies (seventy-one in number) to bring and maintain the suit in the District Court. All but a few intervened in the hearing before the Commission. Each is a common carrier and a competitor of Fleming in some portion of the territory which Fleming is authorized to serve . . . . We do not stop to inquire what effect,

> if any, the status of appellant railroad companies as intervenors before the Commission had on their right to bring and maintain this suit . . . They clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of Fleming for automobile traffic in territory served by him. They are transportation agencies directly affected by competition with the motor transport industry—competition which prior to the Motor Carrier Act of 1935 had proved destructive . . . . They are members of the national transportation system which that Act was designed to coordinate . . . Hence they are parties in interest within the meaning of § 205(h) under the tests announced in [opinions of this Court]."

We submit that there can be no question about the interest of the appellant in avoiding competition by an unlicensed carrier as one which gives it a right to maintain this appeal. It is the same economic interest as that asserted by the appellant in *Frost* and by the railroads in *Alton*. And we point out that the right to maintain the action in those cases was sustained despite the fact that in both, the interested parties were attacking rather than defending governmental action. Cf. *Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 166-67 (1940).

In none of its subsequent cases has this Court cast any doubts on the continued validity of the *Frost* rule. In *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 484-5 (1938), the Court said that "The difference between the *Frost* case and this is fundamental; for the competition contemplated there was unlawful while that of the municipalities contemplated here is entirely lawful." In *Tennessee Power Co.* v. *T.V.A.*, 306 U.S. 118, 143 (1939), the Court offered a different distinction: "The appellants may not raise any question of discrimination forbidden by the Fourteenth Amendment involved in state exemption

of the Authority from commission regulation. For this reason *Frost* . . . on which they rely, is inapplicable. Manifestly there can be no challenge of the validity of state action in this suit." In speaking of these two cases in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 153 (1951), Mr. Justice Frankfurter wrote:

> "The common law does not recognize an interest in freedom from honest competition; a court will give protection from competition by the Government, therefore, only when the Constitution or a statute creates such a right."

In the instant case we are seeking freedom not from "honest competition" but from competition which has failed and refused to comply with the applicable ordinances of the City of Chicago. But more important for purposes of the relevance of these cases, 1) we are not seeking protection from competition by the Government, and 2) we are relying on the rights given by the ordinance of the City of Chicago which limits those who may engage in the transfer business in the City of Chicago to those who have properly secured licenses from the City to do so.

The principal cases cited by appellees-respondents for the proposition that appellant-petitioner is without standing to maintain this appeal are irrelevant. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940), stands for a proposition with which we have no quarrel: "It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such." (310 U.S. at 125) We repeat that we do not assert a standing to challenge action by

the Government; what we are asserting is standing to protect ourselves against action by a private corporation which is in violation of state law. Again, in *Tennessee Power Co.* v. *T.V.A.*, 306 U.S. 118 (1939), the principle asserted was: ". . . that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue." (306 U.S. at 140.) Our case involves competition by Transfer which is otherwise unlawful in that it is being conducted in violation of the laws of the City of Chicago. And as we have already pointed out, the Court in the *Tennessee Power* case clearly distinguished the ruling therein from that in the *Frost* case. Moreover, we think that the characterization of the case given by Professors Hart and Wechsler reveals the underlying reason for denying standing there: "The Court, two justices dissenting, held that the companies were without standing to attack the constitutionality of the act." *The Federal Courts and the Federal System*, 163-64 (1953). Here, of course, we assert no right to attack the constitutionality of any federal or state statute but rather assert our rights under a state statute whose validity is being attacked by our competitors.

Similarly, *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938) and *New Orleans, M. and T. R. Co.* v. *Ellerman*, 105 U.S. 166 (1882), are consistent with the position which we take. In the former, the Court stated the essential question: "What petitioner anticipates, we emphasize, is damage to something it does not possess—namely, a right to be immune from lawful municipal competition. No other claim of right is involved." (302 U.S. at 480.) We repeat that we assert no right to immunity from lawful competition, but only a right to immunity from unlawful competition—competition carried on in violation of state law. In the *Ellerman* case, the Court said: "The damage

is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty." (105 U.S. at 173-74.) We assert that we do have the qualifying "legal interest" in this case because the action of the appellees-respondents is "a breach of some legal duty," the legal duty not to engage in transfer service within the City of Chicago without first obtaining a license. And we point out once again that the Court was clear in distinguishing the problem in the *Alabama Power* case from the *Frost* ruling. 302 U.S. at 484. "We held [in *Frost*] that . . . while the acquisition of the franchise did not preclude the state from making similar valid grants to others, it was exclusive as against an attempt to operate a competing gin without a permit or under a void permit."

The case of *Ex parte Levitt*, 302 U.S. 633 (1937) is, of course, inapposite, for we are not asserting the rights of a citizen without special interest but the rights of a competitor to be free from unlawful competition. The case of the *City of Chicago* v. *Chicago Rapid Transit Co.*, 284 U.S. 577 (1931) is also irrelevant, since it rests on the principle that a municipality is foreclosed from attacking the constitutionality of a law of the State in which the municipality is incorporated. *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394 (1919).

The last weak reed on which appellees-respondents rely in their attempt to distinguish the *Frost* case is one of

language without substance. They assert that the *Frost* case involved a "franchise" while this case involves only a "license." As Judge Biggs said in *Seatrain Lines* v. *United States*, 64 F. Supp. 156, 160 (D. Del., 1946), "Whether the certificate when issued be called a 'franchise' or not is relatively unimportant. Whatever be its proper name, it is a creature of the statute."

We respectfully submit that the standing of the appellant-petitioner to maintain this action is well grounded in the doctrine of the *Frost* case, a precedent whose vitality is attested by the very decisions cited by the appellees-respondents in opposition to our right to maintain this appeal and petition for certiorari.

III.

THE CITY MAY REQUIRE A LICENSE AS A MEANS OF EFFECTUATING ITS LEGITIMATE INTEREST IN REGULATING PUBLIC PASSENGER VEHICLES FOR HIRE, WHERE THE CARRIER DOES NOT HOLD A FEDERAL CERTIFICATE OF CONVENIENCE AND NECESSITY, ALTHOUGH THE CARRIER IS ENGAGED PRIMARILY IN INTERSTATE COMMERCE.

The Court of Appeals has stricken down the City's plan for regulating terminal vehicles in the interest of public safety and welfare, leaving this important branch of the public transportation of passengers for hire within the City unregulated by any governmental agency.

Essentially, the Court of Appeals' decision is based on the proposition that no state authority may require a license as a condition of the right to carry on an interstate business. This Court has repeatedly held otherwise.

Our precise position must be made clear at the outset. Throughout the course of this litigation the City and Parmelee have consistently urged upon the courts a modest

but clear conception of the City's power to regulate the transfer services involved, expressly conceding the established limitations on that power. To quote from their brief in the Court of Appeals (pp. 10, 11):

> "1. We *concede* that the city may not withhold a license to carry on interstate transfer operations solely or even primarily on the ground that existing facilities are adequate, or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925).
>
> "2. We *concede* that the city may not, even in the enforcement of its lawful police regulations, withdraw the privilege of carrying on interstate transportation from a motor carrier holding a certificate of convenience and necessity issued by the Interstate Commerce Commission. *Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954)."

Railroad Transfer Service, Inc., does not hold a certificate of convenience and necessity from the Interstate Commerce Commission, and cannot obtain one. Its operations are not within the coverage of Part II of the Interstate Commerce Act, which regulates motor carriers and it is not a "carrier" under Part I of that Act. *Status of Parmelee Transportation Co.*, 288 I.C.C. 95, 104 (1953). While, therefore, the City may not condition Transfer's right to carry on its interstate operations upon a determination by the City that such operations are necessary and in the public interest in economic terms, the City has the right to impose reasonable regulations in the interest of public safety and welfare, and in the interest of conserving the public streets, and to require a license in aid of such a regulatory plan. The decisions of this Court so hold. The Court of Appeals ignored the distinctions which were so carefully made, and relied upon the inapposite

decisions in *Buck* v. *Kuykendall* and *Castle* v. *Hayes Freight Lines, Inc.* to support its decision.

This Court's most recent decision in point is *Fry Roofing Co.* v. *Wood*, 344 U. S. 157 (1952). A Tennessee manufacturer was transporting his goods to Arkansas by truck under an arrangement which was found to make the owner-drivers of the trucks contract carriers. The truckers had no permit or certificate from either the state or the Interstate Commerce Commission. Arkansas law required such carriers to obtain a permit, or "Certificate of Necessity and Convenience." The truckers sued to enjoin enforcement of the requirement, and the Arkansas Supreme Court dismissed the action. This Court affirmed. Four members of the Court, reading the statute as a regulation of interstate commerce indistinguishable from the Washington statute which was invalidated in *Buck* v. *Kuykendall*, dissented. The majority, however, accepting the interpretation placed upon the statute by state authorities, upheld the right of the state, by requiring a "permit," to require registration in order that the state might properly apply its valid police, welfare, and safety regulations to motor carriers using its highways.

Concededly, the Chicago ordinance here in question involves more than a mere requirement of registration. It includes a registration requirement, and in other ways employs the licensing device in aid of valid regulations designed to promote public safety and welfare. As construed by the District Court and conceded by the City, it does not reserve to the City or its officials any discretionary power to deny a license on grounds such as those which were proscribed in *Buck* v. *Kuykendall*. The fact that the permit in the *Fry* case served only to insure a registration is not the significant factor in that case. What is significant is that the Court, following its previous decisions, there re-

affirmed the power of the state to employ licensing as a sanction in aid of valid police regulations as applied to non-certificated carriers.

More significant than the holding of the *Fry* case itself is its reaffirmation of this Court's decision in *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28 (1939), decided by this Court on appeal 309 U.S. 620 (1940). This case is indistinguishable from the case at bar, and unequivocally sustains the power of the state to employ licensing in aid of valid police regulation of non-certificated carriers.

A number of railroads having their eastern termini in St. Louis, Missouri, contracted with Columbia Terminals for the transportation of incoming through freight by motor truck across the Mississippi River to East St. Louis, Illinois. The freight was then carried to its destination by roads having their western termini at that point. Columbia was thus engaged in terminal transfer operations in all material respects identical with the operations of Transfer in this case. Its operations constituted a link in the chain of interstate commerce as clearly as do those of Transfer in this case. A Missouri statute required motor carriers to obtain a permit, to carry insurance, and to observe certain safety regulations. Columbia did not apply for a state permit. It did apply for a federal permit, but the Interstate Commerce Commission held, as it has held with respect to the transfer operations in this case, that the service was not subject to federal regulation under the Motor Carrier Act. When the state took steps to enforce the licensing requirement, Columbia sued for an injunction in a three-judge court. In a careful opinion, reviewing the pertinent decisions of this Court, the district court recognized that, under *Buck* v. *Kuykendall* and similar cases, the commerce clause is violated

when a state "undertakes to exercise the right to say what interstate commerce will benefit the State and what will not." (30 F. Supp. at 32.) It held, however, that reasonable police regulations are not an unlawful burden upon interstate commerce and are justified so long as Congress has not occupied the field. (30 F. Supp. at 31.) So holding, the district court dismissed the bill for want of jurisdiction, because of the absence of a substantial federal question.

While the case was disposed of by a memorandum *Per Curiam* in this Court, it is apparent that the Court's disposition was a carefully considered one. The Court's order was: "The decree is vacated and the cause is remanded to the District Court with directions to dismiss on the merits." (309 U.S. 620.) In other words, the Court, while regarding the contentions made by Columbia as sufficiently substantial to support the jurisdiction of a three-judge court, unanimously agreed that the district court had rightly rejected those contentions on the merits, and had rightly upheld the validity of the state regulatory law.

The holding in *Columbia Terminals* was again approved in the *Fry* case, which contains this Court's authoritative construction of that holding. The majority in the *Fry* case said:

> "In *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28, the District Court upheld a Missouri statute reading: 'It is hereby declared unlawful for any motor carriers . . . to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the commission a permit so to do. . . .' *Buck* v. *Kuykendall*, 267 U. S. 307, was held not to require the statutes' invalidation, since Missouri had not refused to grant a permit on the ground that the

> state had power to say what interstate commerce would benefit the state and what would not. Agreeing with this constitutional holding, we ordered the complaint dismissed." (344 U. S. 157, 162, note 5.)

The minority in the *Fry* case also referred to *Columbia Terminals*:

> "*Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28, whose ruling we sustained, 309 U. S. 620, is not in point. The Interstate Commerce Commission had ruled in that case that the particular operations there involved were not covered by the Federal Act. See 30 F. Supp., at 30." (344 U. S. 157, 166, note 3.)

Thus, while four members of the Court were of opinion that the doctrine of *Columbia Terminals* did not apply to a noncertificated carrier subject to the Motor Carrier Act, *all* members of the Court reaffirmed the doctrine of that case and its application to carriers *not subject* to the act. We reiterate that the Interstate Commerce Commission has held that the terminal transfer services engaged in by Transfer are not subject to regulation under Part II of the Interstate Commerce Act, covering motor carriers, just as it held that Columbia's terminal transfer services were not subject to regulation under the Motor Carrier Act.

The teaching of the cases is clear. No state or city can withhold a permit to engage in interstate motor transportation on the ground that the state has power to say what interstate commerce will benefit the state and what will not —*i.e.*, to deny a permit on "economic" grounds. But where a carrier does not hold a certificate from the Interstate Commerce Commission—or, at least, where the carrier is not subject to regulation as a motor carrier by the Commission—a state can employ licensing as a sanction for valid regulatory measures designed for the promotion of public safety and welfare.

The decision of the Court of Appeals is also in conflict with the following cases, which are to the same effect:

(1) *Eichholz* v. *Public Service Comm'n*, 306 U.S. 268 (1939) (upholding the power of Missouri to revoke a state permit to engage in interstate motor carrier operations where the carrier had violated state laws relating to intrastate operations; the carrier had applied for a certificate from the Interstate Commerce Commission, but the Commission had not acted on the application. The case is cited with approval in the *Fry* case, 344 U.S. at 162, note 5.)

(2) *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79 (1939) (upholding the power of New Hampshire to suspend the state "registration certificate" of an interstate motor carrier for violation of state law relating to hours of service for drivers. The violations occurred after the enactment of the Federal Motor Carrier Act, but before the effective date of regulations covering hours of service promulgated by the Interstate Commerce Commission. The principle, applicable to the instant case, is that, in the absence of applicable federal regulation, a state may employ licensing as a sanction for regulations designed to promote the public safety and welfare. The case is cited with approval in *Fry*, 344 U.S. at 162, note 5.)

(3) *McDonald* v. *Thompson*, 305 U.S. 263 (1938) (upholding the power of Texas to withhold a certificate from an interstate carrier on the ground that the proposed operations would subject the highways involved to excessive burden and would endanger and interfere with ordinary use by the public. The carrier was subject to, but had no certificate under the Federal Motor Carrier Act. The Court also held that the carrier's interstate operations without the certificate required by Texas law did not qualify it as having been "in bona fide operation as a common carrier" under the "grandfather" clause of the Motor

Carrier Act. The case is cited with approval in *Fry*, 344 U.S. at 162, note 5.)

(4) *Buck* v. *California*, 343 U.S. 99 (1952) (upholding the power of San Diego county to require a permit for taxicab operations in foreign commerce, as a sanction for standards relating to the service and public safety. Taxicabs, like terminal vehicles, are excluded from the coverage of Part II of the Interstate Commerce Act with exceptions not here material.)

The same principle was established prior to the enactment of the Federal Motor Carrier Act, and the cases so holding are still in point since that Act does not cover the operations in question here: *Clark* v. *Poor*, 274 U.S. 554 (1927); *Hicklin* v. *Coney*, 290 U.S. 169 (1933); *Bradley* v. *Public Utilities Comm'n of Ohio*, 289 U.S. 92 (1933); *Continental Baking Co.* v. *Woodring*, 286 U.S. 352 (1932); and see *Texport Carrier Corp.* v. *Smith*, 8 F. Supp. 28 (D. C. S. D. Tex., 1934).

These principles were not affected by the decision of this Court in *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). That case held that a state could not suspend the privilege of a *certificated* interstate carrier to do business, and it implied that a state could not in the first instance withhold from *such a carrier* the privilege of doing interstate business, even as a sanction for the violation of valid police regulations. It is abundantly clear from a reading of the Court's opinion, however, that the principle is limited to carriers holding certificates of convenience and necessity from a federal agency, and has no application to carriers not holding such certificates and not eligible for them.

At the outset of its opinion, this Court noted that Hayes' business was "done under a certificate of con-

venience and necessity issued by the Interstate Commerce Commission under authority of the Federal Motor Carrier Act." (348 U.S. at 62)

The business of Transfer is not done under a certificate of convenience and necessity issued by the Interstate Commerce Commission or any other federal agency; it is done under a mere contract with a group of railroads.

The Supreme Court emphasized that the Motor Carrier Act "provides that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided'." (348 U.S. at 63)

The Illinois suspension of Hayes' right to use the highways was in direct conflict with this provision of federal law. In the instant case, Transfer holds no federal permit, there is no federal machinery for revoking its privileges, and there is no federal law preserving its right to operate until its privileges are so revoked.

This Court emphasized that, ": . . in order to provide stability for operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate." (348 U.S. at 63) The act required a hearing before the Interstate Commerce Commission and a finding by the Commission of willful violation of the Act or regulations. "Under these circumstances," said this Court, "it would be odd if a state could take action amounting to a revocation or suspension of an interstate carrier's *commission-granted right* to operate." (348 U.S. at 64, emphasis supplied)

Since Transfer holds no federal certificate and cannot obtain one, there is no provision for a federal proceeding to determine whether its right to operate should be revoked or suspended, and therefore nothing to interfere

with the City's employment of licensing as a police measure.

This Court said: "It cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a *partial suspension* of its *federally granted* certificate." (348 U.S. at 64 emphasis supplied)

Finally, this Court pointed out that a Commission regulation requires motor carriers subject to the act to abide by valid state highway regulations. "If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we knew of no reason why the Commission may not protect the state's interest, either on the Commission's own initiative or on the complaint of the state." (348 U.S. at 65)

No federal regulation requires Transfer to abide by valid state and city regulations. There is no procedure whereby the City can apply to the Interstate Commerce Commission to enforce valid police regulations against Transfer. Thus, an essential safeguard present in the *Hayes* case is absent here.

There is no escape from the conclusion that the decision of this Court in the *Hayes* case was predicated on a comprehensive and explicit scheme of federal regulation, providing for the issuance of federal certificates of public convenience and necessity, which were to remain in effect until revoked or suspended after carefully devised federal proceedings, and supplying a federal administrative remedy for violation of valid local law. No such scheme and therefore no such foundation for a denial of local power is present in this case. A contract with a group of railroads is plainly no substitute for a federal franchise granted in the context of such a comprehensive regulatory scheme.

Nor can support be found in 49 U.S.C. § 302 (c) that Transfer's operations are regulated by the Interstate Commerce Commission or in some manner come under the Interstate Commerce Act as railroad transportation to effect a federal occupancy of the field or to constitute some form of constructive federal certificate of public convenience and necessity.

Section 202 (c) of the Interstate Commerce Act, Part II, provides in part:

> "Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment shall not apply —
> * * *
>
> "(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to Part I, * * * in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by railroad * * *". (49 U.S.C. § 302 (c) (2))

The Commission pursuant to section 204 of the act promulgated Motor Carrier Safety Regulations which expressly preserved the exercise of local police power as contained in the Chicago Public Passenger Vehicle Code. Regulation 190.33 (49 C.F.R. § 190.33) provides that federal safety regulations, with the exception of maximum hours of employment, shall not apply to "vehicles and drivers used wholly within a municipality or the commercial zone thereof," unless the vehicle is carrying explosives. Transfer operates entirely within a municipality.

Regulation 190.30 (49 C.F.R. §190.30) goes further to assure the preservation of local control, by providing:

> "Except as otherwise specifically indicated, Parts 190-197 of this subchapter [the Motor Carrier Safety Regulations] are not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the persons subject thereto."

Thus, in the single area under Part II in which the federal government has exercised powers relevant to the operations of Transfer, safety and maximum hours of employment, the Interstate Commerce Commission specifically recognized the need for local control over safety; and the Chicago Public Passenger Vehicle Code does not deal with maximum hours of employment. Obviously there is no conflict between local and federal authority here.

It was urged below that the terminal passenger transfer service is in effect railroad transportation, since the railroads involved are subject to Interstate Commerce Commission regulation and as such required to establish and maintain through routes. While the Interstate Commerce Act imposes a duty on railroads to establish reasonable through routes and reasonable facilities for operating such routes (49 U.S.C. §1 (4)), it does not require the railroads to provide terminal transfer service. The opinion of the commission in the case of *Status of Parmelee Transportation Co.*, 288 I.C.C. 95, 100-101 (1953) makes it clear that the provision of transfer service for the through route passengers is done entirely at the option of the railroads:

> "There are numerous points throughout the country, however, where the railroads have not assumed the responsibility for providing free transfer service, and

> no such arrangements are maintained by them at those points. Although through tickets by way of those points are sold by the railroads, passengers traveling over such routes are required, by appropriate tariff provisions, to make their own transfer arrangements."

Transfer has not secured a federal certificate to operate nor is Transfer eligible for such a certificate under Part I or Part II of the Interstate Commerce Act. In *Status of Parmelee* the commission instituted an investigation

> "on its own motion for the purpose of determining whether the Parmelee Transportation Company and the services performed by it are subject to Part I of the Interstate Commerce Act, with a view to entering such orders as may be deemed appropriate." (288 I.C.C. at 95)

The commission found that Parmelee's transfer operations performed under contract with the railroads was exempt from Part II of the Interstate Commerce Act and concluded:

> "that the interstation services performed by the respondent [Parmelee] are identical to, and are subject to regulation in the same manner as, transportation or service performed by railroads subject to Part I of the act, but that the respondent is not a carrier as defined in Part II of the act. An order discontinuing the proceeding will be entered." (288 I.C.C. at 104)

The transportation services which concerned the commission in that case were identical with those carried on by Transfer. Thus the commission itself as a result of statute and through regulations has refused to exercise any authority over the operations of Transfer.

We concede that under 49 U.S.C. § 302 (c) Transfer could be subjected to the exercise of some regulatory

authority by the commission. If such federal regulatory control were imposed, then local authority would be precluded with respect to those matters of federal control. In this instance, however, there has been no assertion of federal authority. The City is merely filling a regulatory gap. No basis for supersedure exists.

IV.

THE COURT OF APPEALS ERRED IN PRESUMING THAT THE ORDINANCE WOULD BE UNCONSTITUTIONALLY APPLIED.

A matter of sheer logomachy has introduced confusion and error into the decision of the Court of Appeals, and should be clarified here once and for all. The Chicago ordinance here in question, in requiring licenses for terminal vehicles, speaks of a finding by the commissioner that public convenience and necessity require the service; and among the factors to which the commissioner is required to give "due consideration" is "The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service." (Municipal Code of Chicago, Section 28-31.1.) Read superficially, this language appears to authorize the commissioner to exercise a discretion on the basis of economic considerations such as were proscribed by *Buck* v. *Kuykendall*. As this Court has often recognized, however, regulatory measures of this kind are commonly drawn for application to both intrastate and interstate operations; the term "public convenience and necessity" does not necessarily import the exercise of dis-

cretion on the basis of "economic" considerations; the validity of the regulation will be upheld so long as inappropriate provisions are not applied to interstate operations; and the courts will accept as authoritative the construction placed on the regulation by appropriate state officials, disclaiming power or intention to give the regulation unconstitutional application.

In the cases which have been cited, upholding state power to license interstate motor carriers in the interest of public safety and welfare and highway conservation, the statutory requirement normally was that the carrier obtain a certificate of public convenience and necessity. This was so in *Clark* v. *Poor*, 274 U.S. 554 (1927) (see Ohio Gen. Code, Section 614-87 (1929)); *Hicklin* v. *Coney*, 290 U.S. 169 (1933) (see S.C. Code 1932, Section 8510); *Bradley* v. *Public Utilities Comm'n of Ohio*, 289 U.S. 92 (1933); *Eichholz* v. *Public Utilities Comm'n of Missouri*, 306 U.S. 268 (1939); and *McDonald* v. *Thompson*, 305 U.S. 263 (1938). Sometimes, as in *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28 (E.D. Mo. 1939), *Buck* v. *California*, 343 U.S. 99 (1952), and *Fry Roofing Co.* v. *Wood*, 344 U.S. 157 (1952), the authority to operate has been designated a "permit"; but that has not been a distinguishing factor. Typically, as in the *Columbia Terminals* case, the statute has also contained language specifying "economic" factors to be taken into consideration by the licensing official—language inappropriate to the exercise of the licensing power with respect to interstate carriers. But this Court has never decided the cases on merely literal grounds. This Court has never doubted that a "certificate of public convenience and necessity" may appropriately be withheld on grounds relating to the valid exercise of the police power, and has invalidated statutes requiring such certificates only when the carrier was able to show, as in

Buck v. *Kuykendall*, that the license was denied on improper grounds.

(See also *Ex parte Truelock*, 139 Tex. Crim. Rep. 365, 140 S.W. 2d 167, 169 (1940); *Cannon Ball Transportation Co.* v. *Public Utilities Comm'n of Ohio*, 113 Ohio St. 565, 149 N.E. 713 (1925); *Wald Storage and Transfer Co.* v. *Smith*, 4 F. Supp. 61 (S.D.Tex., three-judge court 1933) aff'd 290 U.S. 596 (1933).)

In the court of appeals, the *Columbia Terminals* case —a powerful precedent, on all fours with the case at bar —was disposed of in a footnote (note 26) on the ground that, while the licensing statute spoke in terms of a finding of public benefit (*i.e.*, of economic considerations), the state had expressly admitted that it lacked such power and made no such demand. But in this respect the cases are identical. In Appellees' Brief in the court of appeals, signed by John C. Melaniphy, Corporation Counsel and chief legal officer of the City of Chicago, representing the City, the Mayor, the Public License Commissioner, and the Commissioner of Police, there appears the following clear statement (at page 36):

> "We *concede* that the city may not withhold a license to carry on interstate transfer operations solely or even primarily on the ground that existing facilities are adequate, or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925)." (Emphasis added)

In Part III of the same brief (pages 51-58) the appellees in the court of appeals, including the City and all appropriate officials thereof, urged that the proper construction of the ordinance was the one adopted by Judge LaBuy in the District Court, *viz.*, that the ordinance did not author-

ize the withholding of a license on economic grounds, but only on considerations relating to public safety, traffic, and the conservation and maintenance of streets. Precisely as in *Columbia Terminals*, the City disclaimed any and every authority or intention to give to the ordinance in question an unconstitutional application. It follows that the full force of the reasoning in *Columbia Terminals* is applicable to this case:

> "The mere susceptibility of a statute to a construction which could render it unconstitutional does not afford sufficient ground for injunctive relief where, as here, it does not appear that the statute has ever been so construed, where the enforcing authorities affirm a recognition of its unconstitutionality if so construed and disclaim any intention of doing so, and where plaintiff's real ground for relief is not the application of the Statute to it." (30 F. Supp. at 32.)

Clark v. *Poor*, 274 U.S. 554 (1927), is also squarely in point. The Ohio statute required a certificate of public convenience and necessity. Without applying for a certificate, the carrier, engaged exclusively in interstate commerce, sought an injunction. A three-judge court dismissed the bill, and this Court affirmed, saying (at 556):

> "It appeared that while the Act calls the certificate one of 'public convenience and necessity,' the Commission had recognized, before this suit was begun, that, under *Buck* v. *Kuykendall*, 267 U.S. 307 and *Bush* v. *Maloy*, 267 U.S. 317, it had no discretion where the carrier was engaged exclusively in interstate commerce, and was willing to grant to plaintiffs a certificate upon application and compliance with other provisions of the law."

The plaintiffs in that case also contended that the decree should be reversed because the statute provided that no certificate should issue until the carrier filed cargo insurance policies. This Court said:

"The lower court held that, under *Michigan Public Utilities Commission* v. *Duke*, 266 U.S. 570, this provision could not be applied to exclusively interstate carriers . . .; and *counsel for the Commission stated in this Court that the requirements for insurance would not be insisted upon.* Plaintiffs urge that because this was not conceded at the outset, it was error to deny the injunction. The circumstances were such that it was clearly within the discretion of the court to decline to issue an injunction . . ." (274 U.S. at 557-58.) (Emphasis ours)

In refusing to accept the construction placed upon the ordinance by responsible city officials, and in disregarding the canon that legislation is to be construed if possible to avoid constitutional questions, the court of appeals departed from salutary principles established by the decisions of this Court. See *Phyle* v. *Duffy*, 334 U.S. 431, 441 (1948); *Gerende* v. *Board of Supervisors of Elections of Baltimore City*, 341 U.S. 56, 57 (1951); *Fox* v. *Washington*, 236 U.S. 273 (1915); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 470 (1945).

V.

IN GRATUITOUSLY ANTICIPATING CONSTITUTIONAL QUESTIONS, AND IN NOT REQUIRING THE PLAINTIFFS TO EXHAUST THEIR ADMINISTRATIVE REMEDIES, THE COURT OF APPEALS DECIDED A CONSTITUTIONAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Since the City clearly has power, under the cases cited, to require a license as a means of enforcing valid regulations designed to promote public safety and welfare, the invalidation of the ordinance must rest upon apprehension that the ordinance will be unconstitutionally applied, despite the responsible assurances given by counsel that there

is no such intention. Indeed, the opinion of the Court of Appeals appears to adopt the charge made by counsel for the railroads, that "as a purported safety measure, this [the ordinance] is sham and spurious" (R. 207); and that court itself charges without qualification that the ordinance is an attempt to give Parmelee a monopoly of terminal vehicle licenses, "'rather than an exercise of the city's police power over traffic.'" (R. 208)

These are serious charges for any court to make against any legislative body. It is particularly regrettable that a United States court should make such charges against a city council, especially where the city and all its responsible officials have assured the court that they construe the ordinance otherwise, and where the parties invoking the jurisdiction of the court have failed and refused to apply for licenses. Not having applied for a license, Transfer is in the position of obdurately refusing the city's assurance that the ordinance will be applied constitutionally and in good faith, and of charging irresponsibly that the city will, "in the guise of an exercise of its police power, . . . cripple interstate commerce." (R. 208) Throughout this litigation, the attack on the ordinance has been a compound of speculation and conjecture. The argument has been that if Transfer were to apply for a license (which it has no intention of doing), the commissioner would deny the application (which he has not done), and that the evidence (which has not been introduced) in the record (which has not been made) before the commissioner could not support the action (which has not been taken) if it purported to rest on considerations of public safety and welfare as distinguished from prohibited economic considerations. The validity of the ordinance and the good faith of the city cannot be impugned in such a way.

We need not dwell on cases establishing the general principle that requires exhaustion of administrative remedies

(*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Aircraft and Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752 (1947); the exact question as it is presented in this case has been decided by this Court. The situation here is identical with that in *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28, aff'd 309 U.S. 620 (1940). There the district court said:

> "One who is within the terms of a statute, valid upon its face, that requires a license or certificate as a condition precedent to carrying on business may not complain because of his anticipation of improper or invalid action in administration [cited cases omitted]. The plaintiff has neglected to make application for a permit covering its operations. . . . Until it does so, it is not in position to invoke the injunctive powers of this Court to restrain the enforcement of the State laws. 'The long-settled rule of judicial administration [is] that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted.'" (30 F. Supp. at 33-34.)

This Court in its recent decisions has refused to hold unconstitutional a state statute or municipal ordinance requiring a license for interstate motor carrier operations *in the absence of an application for a license and a denial on unconstitutional grounds.* Those cases holding licensing laws invalid are all cases in which the carrier followed the appropriate procedure, pursued his administrative remedies, applied for a license, made a record suitable for judicial review, and presented the reviewing court with evidence that the license had been denied or withdrawn on unconstitutional grounds. Where the carrier has sought relief by injunction or otherwise without pursuing his administrative remedies, relief has been denied.

In *Buck* v. *Kuykendall*, 267 U.S. 307 (1925), where the Court held the licensing requirement invalid, it acted on

the basis of a record showing the denial of a license and the grounds of denial. The same is true of *Bush* v. *Maloy*, 267 U.S. 317 (1925).

On the other hand, in *Continental Baking Co.* v. *Woodring*, 286 U.S. 352 (1932), where the carrier sought an injunction without applying for a license, relief was denied. In *Hicklin* v. *Coney*, 290 U.S. 169 (1933), where the carrier, without applying for a license, resisted an enforcement proceeding on the ground of invalidity, the defense failed. In *McDonald* v. *Thompson*, 305 U.S. 263 (1938), where the carrier sought an injunction without applying for a license, relief was denied. In *Buck* v. *California*, 343 U.S. 99 (1952), the defendants asserted the invalidity of the statute as a defense to an enforcement proceeding. While they had made oral applications for licenses, the ordinance required written applications, and the record failed to show the grounds for denial. The situation was equivalent to one in which no application had been made, and the defense failed. In *Fry Roofing Co.* v. *Wood*, 344 U.S. 157 (1952), the carrier sought an injunction without applying for a license, and relief was denied. Similarly, in *State* v. *Nagle*, 148 Me. 197, 91 A.2d 397 (1952), the carrier, without applying for a license, asserted the invalidity of the ordinance as a defense to an enforcement proceeding. The defense failed, the court saying:

> "Even though the issue of the permit is mandatory provided the condition of the highways to be used is such that it would be safe for the operation proposed, and the safety of other users of the highways would not be endangered thereby, the Public Utilities Commission under the statute here in question has not only the duty but the power and authority to determine these questions as questions of fact." (148 Me. 197, 207-8, 91 A.2d 397, 402.)

The point is made with great clarity in *Clark* v. *Poor*, 274 U.S. 554 (1927). There the carrier, ignoring the provisions of the statute, operated without applying for a certificate, and sought injunctive relief against enforcement. There, as here and as in *Fry* and *Columbia Terminals*, the licensing laws read in terms of economic factors as well as of valid police regulation, but the local authorities had disclaimed any authority or intention to withhold a license on grounds proscribed by *Buck* v. *Kuykendall*. Relief was denied. "The plaintiffs did not apply for a certificate or offer to pay the taxes. They refused or failed to do so, not because insurance was demanded, but because of their belief that, being engaged exclusively in interstate commerce, they could not be required to apply for a certificate or to pay the tax. Their claim was unfounded." This Court's disposition of that appeal furnishes, we submit, the model for the disposition of the appeal in this case:

> "The decree dismissing the bill is affirmed, but without prejudice to the right of the plaintiffs to seek appropriate relief by another suit if they should hereafter be required by the Commission to comply with conditions or provisions not warranted by law." (274 U.S. at 558.)

VI.

THE COURT OF APPEALS ERRED IN INQUIRING INTO THE MOTIVES OF THE CITY COUNCIL IN ORDER TO STRIKE DOWN THE ORDINANCE.

On the basis of certain records of the Committee on Local Transportation of the City Council, the Court of Appeals attributed to the City Council improper motives in the enactment of the amendment of 1955, and on the basis of such supposed motives held invalid an ordinance otherwise valid.

This Court has reiterated, time and again, that it is not the function of the federal courts to question the motives of legislatures. Only recently, speaking for the Court, Mr. Justice Frankfurter said:

> "The holding of this Court in *Fletcher* v. *Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona* v. *California*, 283 U.S. 423, 455." *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951).

That this doctrine refers not only to the motives of federal legislators, which were involved in the *Brandhove* case, but to legislators of the states as well, is apparent not only from the reference to *Fletcher* v. *Peck*, but from the specific statement in *Arizona* v. *California*: "Similarly, no inquiry may be made concerning the motives or wisdom of a state legislature acting within its proper powers." 283 U.S. at 455, n. 7. Or to use Mr. Justice Holmes' language, in a case which, like this one, involved an attack on a legislature's amendment of its own legislation: ". . . . we do not inquire into the knowledge, negligence, methods or motives of the legislature if, as in this case, the repeal was passed in due form." *Calder* v. *Michigan ex rel. Ellis*, 218 U.S. 591, 598 (1910).

Of the long series of cases substantiating the proposition that the Court of Appeals erred in looking beyond the legislation to the motives of the legislators, two more are of particular interest. In *Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220 (1949), the contention was that the legislation in issue had been secured by competitors of the plaintiff in order to maintain their own preferred position rather than to abate evils which the state had the right to abate. The Court there sustained the regulation and stated:

"It is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality." (336 U.S. at 224.)

In *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949), an attack was made on a police regulation which forbade trucks to carry advertising on their sides unless the advertising was on behalf of the owner and operator of the trucks. The challenge was made, in part on the grounds of the Commerce Clause, that such a regulation could not possibly have anything to do with the exercise of the police power. In the course of its opinion the Court said:

"We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false." (336 U.S. at 109.)

"The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants." (336 U.S. at 110.)

"It is finally contended that the regulation is a burden on interstate commerce in violation of Art. I, § 8 of the Constitution. Many of these trucks are engaged in delivering goods in interstate commerce from New Jersey to New York. *Where traffic control and*

the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce. The case in that posture is controlled by South Carolina State Highway Dept. v. *Barnwell Bros.*, 303 U. S. 177." (336 U.S. at 111, emphasis added.)

See also *Breard* v. *Alexandria*, 341 U.S. 622, 639 (1951).

That Illinois law requires the same result is made abundantly clear by the long line of authorities cited in Judge LaBuy's opinion in the District Court. See 136 F. Supp. 476, at 483.

Furthermore, the court of appeals has misconceived and misconstrued the legislative history and purpose involved in the 1955 amendment. To the extent that this history has any pertinence, it reveals clearly that the City did not seek to grant an exclusive right to Parmelee or any other company, but that the City exercised its right to control the commercial use of its streets by terminal vehicles; sought to permit Parmelee to continue operating commercially over city streets without the necessity of a contract with the railroads, and permitted additional licenses to be issued upon appropriate showing. Having broadened the definition of terminal vehicles, the City set up a reasonable system for regulating the issuance of additional licenses. This is in line with action taken by the City Council in other similar situations involving the City's licensing powers. This reasonable construction of the legislative history of the 1955 amendment is fully supported by the stenographic transcripts and minutes of the local transportation committee upon which the court of appeals relies for its misconception. (R. 90-5)

In short, the court of appeals erroneously sought to determine the motive of the City Council in amending the ordinance; speculated erroneously on the nature of that

motive, attributing illegal and improper motives to the City Council; and, disregarding the responsible assurances and commitments made to the court by the city's chief legal officer, struck down a valid ordinance on the basis of an unwarranted and presumptuous conviction that the ordinance, as a police measure, was "sham and spurious." In so doing, the court exceeded its judicial powers.

VII.

THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE CITY COUNCIL ON THE PURELY LEGISLATIVE QUESTION OF WHETHER LICENSING IS A NECESSARY OR DESIRABLE SANCTION FOR THE IMPLEMENTATION OF THE CITY'S POLICE REGULATION OF TERMINAL VEHICLES.

In taking the position that no governmental control over the number of terminal vehicles in operation was necessary in order to avoid traffic congestion, protect the safety of the public, and preserve the streets of the city, and that the license requirement was not a necessary sanction for the implementation of the city's legitimate police powers, the court of appeals assumed to substitute its judgment for that of the city council on a matter clearly within its legislative discretion.

At page 11 of its opinion the court of appeals says:

> "To us it appears that the cost of maintaining the terminal vehicle service, which is initially borne by Transfer and ultimately, to the extent of coupons issued and used, by the individual Terminal Lines, will operate effectively as an economic brake upon any unjustified increase in the number of such vehicles." (R. 208)

This is tantamount to a determination that regulation of the number of terminal vehicles in operation is unneces-

sary for protection of the public safety and for conservation of the streets. Such a determination calls for the exercise of legislative judgment. Regulation of the use of the streets is committed to the City Council, which has determined that regulation of such vehicles is necessary in the public interest. Moreover, the Court's statement overlooks those aspects of the ordinance which regulate aspects of the terminal vehicle business other than the mere number of vehicles employed.

At page 13 of its opinion the court of appeals says:

> "If Transfer's vehicles do not conform to the requirements contained in the prior [sic] ordinance, the city may refuse to issue licenses for the nonconforming vehicles and penalize their unlicensed operation in accordance with § 28-32. So, also, whenever Transfer is found guilty of violating § 28-17 *the city may proceed against it according to the penalties section.*" (Emphasis supplied. Appendix page 31a)

Passing the point, which becomes clear on even a cursory reading of the ordinance, that licensing is in many respects the only effective implementation for the city's plan for regulating public passenger vehicles, it is abundantly clear that the court exceeded its judicial authority in passing judgment on the need for the license as a sanction. If, as we submit, the City has power to use the licensing sanction in furtherance of its legitimate police powers, it was not competent for the court of appeals to determine that that sanction is not to be employed because direct remedies by way of fines for violations of the safety provisions of the ordinance are adequate. The choice of available sanctions to implement a regulatory scheme is surely a matter for legislative discretion alone. *Robinson* v. *United States*, 324 U. S. 282, 286 (1945); *Building Service Employers International Union, Local 262* v. *Gazzam*, 339 U.S. 532, 540 (1950); *Watson* v. *Buck*, 313 U.S. 387, 403 (1941).

CONCLUSION.

The judgment of the court of appeals should be vacated and the judgment of the district court reinstated, without prejudice to the right of the appellees-respondents to apply for relief when or if the City attempts to subject them to unconstitutional requirements.

Respectfully submitted,

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APPENDIX A.

MUNICIPAL CODE OF CHICAGO
CHAPTER 28
PUBLIC PASSENGER VEHICLES

28-1. As used in this chapter:

"Busman" means a person engaged in business as proprietor of one or more sightseeing buses.

"Cabman" means a person engaged in business as proprietor of one or more taxicabs or livery vehicles.

"Chauffeur" means the driver of a public passenger vehicle licensed by the city of Chicago as a public chauffeur.

"City" means the city of Chicago.

"Coachman" means a person engaged in business as proprietor of one or more terminal vehicles.

"Commissioner" means the public vehicle license commissioner, or any other body or officer having supervision of public passenger vehicle operations in the city.

"Council" means the city council of the city of Chicago.

"Livery vehicle" means a public passenger vehicle for hire only at a charge or fare for each passenger per trip or for each vehicle per trip fixed by agreement in advance.

"Person" means a natural person, firm or corporation in his own capacity and not in a representative capacity, the personal pronoun being applicable to all such persons of any number or gender.

"Public passenger vehicle" means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in

operation of a metropolitan transit authority or public utility under the laws of Illinois.

"Sightseeing vehicle" means a public passenger vehicle for hire principally on sightseeing tours at a charge or fare per passenger for each tour fixed by agreement in advance or for hire otherwise at a charge for each vehicle per trip fixed by agreement in advance.

"Taxicab" means a public passenger vehicle for hire only at lawful rates of fare recorded and indicated by taximeter in operation when the vehicle is in use for transportation of any passenger.

"Taximeter" means any mechanical device which records and indicates a charge or fare measured by distance traveled, waiting time and extra passengers.

"Terminal vehicle" means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31.

28-2. It is unlawful for any person other than a metropolitan transit authority or public utility to operate any vehicle, or for any such person who is the owner of any vehicle to permit it to be operated, on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, except on a funeral trip, unless it is licensed by the city as a public passenger vehicle.

It is unlawful for any person to hold himself out to the public by advertisement or otherwise as a busman, cabman or coachman or as one who provides or furnishes any kind of public passenger vehicle service unless he has one or more public passenger vehicles licensed for the class of service offered; provided that any association or corporation which furnishes call service for transportation may advertise the class of service which may be rendered to its members or subscribers, as provided in this chapter, if it assumes the liability and furnishes the insurance as required by section 28-23.

28-3. Nothing in this chapter shall be construed to prohibit any public passenger vehicle from coming into the city to discharge passengers accepted for transportation outside the city. While such vehicle is in the city no person shall solicit passengers therefor and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of the vehicle. Any person in control or possession of such vehicle who violates the provisions of this section shall be subject to arrest and fine of not less than fifty dollars nor more than two hundred dollars for each offense.

28-4. No vehicle shall be licensed as a public passenger vehicle until it has been inspected under the direction of the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers.

28-4.1. No vehicle shall be licensed as a livery vehicle or taxicab unless it has two doors on each side, and no vehicle having seating capacity for more than seven passengers shall be licensed as a public passenger vehicle unless it has at least three doors on each side or fixed aisle space for passage to doors.

28-5. Application for public passenger vehicle licenses shall be made in writing signed and sworn to by the applicant upon forms provided by the commissioner. The application shall contain the full name and Chicago street address of the applicant, the manufacturer's name, model, length of time in use, horse power and seating capacity of the vehicle applicant will use if a license is issued, and the class of public passenger vehicle license requested. The commissioner shall cause each application to be stamped with the time and date of its receipt. The applicant shall submit a statement of his assets and liabilities with his application.

28-6. Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an

investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year.

28-7. The annual fee for each public passenger vehicle license of the class herein set forth is as follows:

Livery vehicle	$ 25.00
Sightseeing vehicle	125.00
Taxicab	40.00
Terminal vehicle	25.00

Said fee shall be paid in advance when the license is issued and shall be applied to the cost of issuing such license, including, without being limited to, the investigations, inspections and supervision necessary therefor, and to the cost of regulating all operations of public passenger vehicles as provided in this chapter.

Nothing in this section shall affect the right of the city to impose or collect a vehicle tax and any occupational tax, as authorized by the laws of the state of Illinois, in addition to the license fee herein provided.

28-8. All licenses for public passenger vehicles issued for the year 1951, which have not been revoked or surrendered prior to the time when such licenses for the year 1952 shall have been issued, may be renewed from year to year, subject to the provisions of this chapter.

28-9. No public passenger vehicle license shall be subject to voluntary assignment or transfer by operation of law, except in the event of the licensee's induction or recall into the armed forces of the United States for active duty or in the event of the licensee's death. In case of death the assignment shall be made by the legal representatives of his estate. No assignment shall be effective until the assignee shall have filed application for a license and is found to be qualified as provided in sections 28-5 and 28-6. If qualified the license shall be transferred to him by the commissioner, subject to payment of a transfer fee of $50.00, the assumption by the assignee of all liabilities for loss, or damage resulting from any occurrence arising out of or caused by the operation or use of the licensed public passenger vehicle before the effective date of the transfer and the approval by the commissioner of the insurance to be furnished by the busman, cabman or coachman as required by section 28-12.

It is unlawful for any busman, cabman or coachman to lease or loan a licensed public passenger vehicle for operation by any person for transportation of passengers for hire within the city. No person other than a chauffeur, who is either the busman, cabman or coachman or one hired by the busman, cabman or coachman to drive such vehicle as his agent or employee, in the manner prescribed by the busman, cabman or coachman, shall operate such vehicle for the transportation of passengers for hire within the city.

There shall be no discrimination by any busman, cabman or coachman against any person employed or seeking employment as a chauffeur with respect to hire, promotion, tenure, terms, conditions and privileges of employment on account of race, color, religion, national origin or ancestry.

28-10. The commissioner shall deliver with each license a sticker license emblem which shall bear the words "Public Vehicle License" and "Chicago" and the numerals designating the year for which such license is issued, a reproduction of the corporate seal of the city, the names of the

mayor and the commissioner and serial number identical with the number of the public vehicle license. The predominant back-ground colors of such sticker license emblems shall be different from the vehicle tax emblem for the same year and shall be changed annually. The busman, cabman or coachman shall affix, or cause to be affixed, said sticker emblem on the inside of the glass part of the windshield of said vehicle.

28-11. In addition to the license and sticker emblem the commissioner shall deliver a license card for each vehicle. Said card shall contain the name of the busman, cabman or coachman, the license of the vehicle and the date of inspection thereof. It shall be signed by the commissioner and shall contain blank spaces upon which entries of the date of every inspection of the vehicle and such other entries as may be required shall be made. It shall be of different color each year. A suitable frame with glass cover shall be provided and affixed on the inside of the vehicle in a conspicuous place and in such manner as may be determined by the commissioner for insertion and removal of the public passenger vehicle license card; and in every livery vehicle and taxicab said frame shall also be provided for insertion and removal of the chauffeur's license card and such other notice as may be required by the provisions of this chapter and the rules of the commissioner. It is unlawful to carry any passenger or his baggage unless the license cards are exposed in the frame as provided in this section.

28-12. Every busman, cabman or coachman shall carry public liability and property damage insurance and workmen's compensation insurance for his employees with solvent and responsible insurers approved by the commissioner, authorized to transact such insurance business in the state of Illinois, and qualified to assume the risk for the amounts hereinafter set forth under the laws of Illinois, to secure payment of any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the busman's, cabman's or coachman's public passenger vehicles.

The public liability insurance policy or contract may cover one or more public passenger vehicles; but each vehicle shall be insured for the sum of at least five thousand dollars for property damage and fifty thousand dollars for injuries to or death of any one person and each vehicle having seating capacity for not more than seven adult passengers shall be insured for the sum of at least one hundred thousand dollars for injuries to or death of more than one person in any one accident. Each vehicle having seating capacity for more than seven adult passengers shall be insured for injuries to or death of more than one person in any one accident for at least five thousand dollars more for each such additional passenger capacity. Every insurance policy or contract for such insurance shall provide for the payment and satisfaction of any final judgment rendered against the busman, cabman or coachman and person insured, or any person driving any insured vehicle, and that suit may be brought in any court of competent jurisdiction upon such policy or contract by any person having claims arising from the operation or use of such vehicle. It shall contain a description of each public passenger vehicle insured, manufacturer's name and number, the state license number and the public passenger vehicle license number.

In lieu of an insurance policy or contract a surety bond or bonds with a corporate surety or sureties authorized to do business under the laws of Illinois, may be accepted by the commissioner for all or any part of such insurance; provided that each bond shall be conditioned for the payment and satisfaction of any final judgment in conformity with the provisions of an insurance policy required by this section.

All insurance policies or contracts or surety bonds required by this section, or copies thereof certified by the insurers or sureties, shall be filed with the commissioner and no insurance or bond shall be subject to cancellation except on thirty days' previous notice to the commissioner. If any insurance or bond is cancelled or permitted to lapse for any reason, the commissioner shall suspend the license

for the vehicle affected for a period not to exceed thirty days, to permit other insurance or bond to be supplied in compliance with the provisions of this section. If such other insurance or bond is not supplied, within the period of suspension of the license, the mayor shall revoke the license for such vehicle.

28-13. All judgments and awards rendered by any court or commission of competent jurisdiction for loss or damage in the operation or use of any public passenger vehicle shall be paid by the busman, cabman or coachman within ninety days after they shall become final and not stayed by supersedeas. This obligation is absolute and not contingent upon the collection of any indemnity from insurance.

28-14. If any public passenger vehicle shall become unsafe for operation or if its body or seating facilities shall be so damaged, deteriorated or unclean as to render said vehicle unfit for public use, the license therefor shall be suspended by the commission until the vehicle shall be made safe for operation and its body shall be repaired and painted and its seating facilities shall be reconditioned or replaced as directed by the commissioner. In determining whether any public passenger vehicle is unfit for public use the commissioner shall give consideration to its effect on the health, comfort and convenience of passengers and its public appearance on the streets of the city.

Upon suspension of a license for any cause, under the provisions of this chapter, the license sticker emblem shall be removed by the commissioner from the windshield of the vehicle and an entry of the suspension shall be made on the license card. If the suspension is terminated an entry thereof shall be made on the license card by the commissioner and a duplicate license sticker shall be furnished by the commissioner for a fee of one dollar. The commissioner shall notify the department of police of every suspension and termination of suspension.

28-15. If any summons or subpoena issued by a court or commission cannot be served upon the busman, cabman or coachman at his last Chicago address recorded in the

office of the commission within sixty days after such process is delivered to the person authorized to serve it, and the busman, cabman or coachman fails to appear in answer to such process for want of service, or if any busman, cabman or coachman shall refuse or fail to pay any judgment or award as provided in section 28-13, or shall lease or loan any of his licensed public passenger vehicles for operation by any person for hire or shall be convicted of a felony or any criminal offense involving moral turpitude, the mayor shall revoke all public vehicle licenses held by him.

If any public passenger vehicle license was obtained by application in which any material fact was omitted or stated falsely, or if any public passenger vehicle is operated in violation of the provisions of this chapter for which revocation of the license is not mandatory, or if any public passenger vehicle is operated in violation of the rules and regulations of the commissioner relating to the administration and enforcement of the provisions of this chapter, the commissioner may recommend to the mayor that the public passenger vehicle license therefor be revoked and the mayor, in his discretion, may revoke said license.

Upon revocation of any license, the commissioner shall remove the license sticker emblem and the license card from the vehicle affected.

28-16. Every busman, cabman or coachman shall deliver or submit his public passenger vehicles for inspection or the performance of any other duty by the commissioner upon demand. It is unlawful for any person to interfere with or hinder or prevent the commissioner from discharging any duty in the enforcement of this chapter.

28-17. It is unlawful to permit more than one passenger to occupy the front seat with the chauffeur in any public passenger vehicle.

28-18. It is the duty of every busman, cabman or coachman to notify the commissioner whenever any change in his Chicago address is made. Any notice required to be

given to the busman, cabman or coachman shall be sufficient if addressed to the last Chicago address recorded in the office of the commissioner.

28-19. No person shall be qualified for a livery vehicle license and a taxicab license at the same time; nor shall any person having a livery vehicle license be associated with anyone for sending or receiving calls for taxicab service.

No license for any livery vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing, the commissioner shall determine that public convenience and necessity require additional livery service and shall recommend to the council the maximum number of such licenses to be authorized by ordinance.

Not more than six passengers shall be accepted for transportation in a livery vehicle on any trip.

28-19.1. It is unlawful for any person to operate or drive a livery vehicle equipped with a meter which registers a charge or fare or indicates the distance traveled by which the charge or fare to be paid by a passenger is measured.

28-19.2. It is unlawful for any person to solicit passengers for transportation in a livery vehicle on any public way. No such vehicle shall be parked on any public way for a time longer than is reasonably necessary to accept passengers in answer to a call for service and no passengers shall be accepted for any trip in such vehicle without previous engagement for such trip, at a fixed charge or fare, through the station or office from which said vehicle is operated.

28-20. It is unlawful for the cabman of any livery vehicle, or the station from which it is operated to use the word "taxi", "taxicab" or "cab" in connection with or as part of the name of the cabman or his trade name.

The outside of the body of each livery vehicle shall be uniform black, blue or blue-black color. No light fixtures or lights shall be attached to or exposed so as to be visible outside of any livery vehicle, except such as are required by the law of the state of Illinois regulating traffic by motor vehicles and one rear red light in addition to those required by said law. No name, number or advertisement of any kind, excepting official license emblems or plates, shall be painted or carried so as to be visible outside of any livery vehicle.

It is unlawful for any person to hold himself out to the public by advertisement, or otherwise, to render any livery service unless he is the cabman of a licensed livery vehicle.

28-21. Sightseeing vehicles shall not be used for transportation of passengers for hire except on sightseeing tours or chartered trips. Passengers for sightseeing tours shall not be solicited upon any public way except at bus stands especially designated by the council for sightseeing vehicles.

It is unlawful for any cabman or coachman to advertise his public passenger vehicle for hire on sightseeing tours.

28-22. Every taxicab shall be operated regularly to the extent reasonably necessary to meet the public demand for service. If the service of any taxicab is discontinued for any reason except on account of strike, act of God or cause beyond the control of the cabman, the commissioner may give written notice to the cabman to restore the taxicab to service, and if it is not restored within five days after notice, the commissioner may recommend to the mayor that the taxicab license be revoked and the mayor, in his discretion, may revoke same.

28-22.1 Not more than 3761 taxicab licenses shall be issued unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional taxicab service and shall recommend the number of taxicab licenses which may be issued. Notice of such hearing stating the time and place thereof shall be

published in the official newspaper of the city at least twenty days prior to the hearing and by mailing a copy thereof to all taxicab licensees. At such hearing any licensee, in person or by attorney, shall have the right to cross-examine witnesses and to introduce evidence pertinent to the subject. At any time and place fixed for such hearing it may be adjourned to another time and place without further notice.

In determining whether public convenience and necessity require additional taxicab service, due consideration shall be given to the following:

1. The public demand for taxicab service;
2. The effect of an increase in the number of taxicabs on the safety of existing vehicular and pedestrian traffic;
3. The effect of increased competition,
   (a) on revenues of taxicab licensees;
   (b) on cost of rendering taxicab service, including provisions for proper reserves and a fair return on investment in property devoted to such service;
   (c) on the wages or compensation, hours and conditions of service of taxicab chauffeurs;
4. The effect of a reduction, if any, in the level of net revenues to taxicab licensees on reasonable rates of fare for taxicab service;
5. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional taxicab service, the council, by ordinance, may fix the maximum number of taxicab licenses to be issued, not to exceed the number recommended by the commissioner.

28-23. Every taxicab shall have the cabman's name, telephone number and the public passenger vehicle license number plainly painted in plain Gothic letters and figures of three-eighth inch stroke and at least two inches in height

in the center of the main panel of the rear doors of said vehicle. In lieu of the cabman's telephone number the name and telephone number of any corporation or association with which the cabman is affiliated may be painted in the same manner, provided such corporation or association shall have assumed equal liability with the cabman for any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the cabman's taxicabs and shall carry and furnish to the commissioner public liability and property damage insurance to secure payment of such loss or damage as provided in section 28-12. The public vehicle license number assigned to any taxicab shall be assigned to the same vehicle or to any vehicle substituted therefor upon annual renewal of the license. No other name, number or advertisement of any kind, excepting signs required by this chapter, official license emblems or plates and a trade emblem, in a manner approved by the commissioner, shall be painted or carried so as to be visible on the outside of any taxicab.

28-24. Every taxicab shall be equipped with a taximeter connected with and operated from the transmission of the taxicab to which it is attached. The taximeter shall be equipped with a flag at least three inches by two inches in size. The flag shall be plainly visible from the street and shall be kept up when the taxicab is for hire and shall be kept down when it is engaged.

Taximeters shall have a dial or dials to register the tariff in accordance with the lawful rates and charges. The dial shall be in plain view of the passenger while riding and between sunset and sunrise th dial shall be lighted to enable the passenger to read it.

It is unlawful to operate a taxicab for hire within the city unless the taximeter attached thereto has been sealed by the commission.

28-25. At the time a taxicab license is issued and semi-annually thereafter the taximeter shall be inspected and tested by the commissioner to determine if it complies

with the specifications of this chapter and accurately registers the lawful rates and charges. If it is in proper condition for use, the taximeter shall be sealed and a written certificate of inspection shall be issued by the commissioner to the cabman. Upon complaint by any person that a taximeter is out of working order or does not accurately register the lawful rates and charges it shall be again inspected and tested and, if found to be in improper working condition or inaccurate, it shall be unlawful to operate the taxicab to which it is attached until it is equipped with a taximeter which has been inspected and tested by the commissioner, found to be in proper condition, sealed and a written certificate of inspection therefor is issued.

The cabman or person in control or possession of any taxicab shall deliver it with the taximeter attached or deliver the taximeter detached from the taxicab for inspection and test as requested by the commissioner. The cabman may be present or represented when such inspection and test is made.

28-26. It is unlawful for any person to tamper with, mutilate or break any taximeter or the seal thereof or to transfer a taximeter from one taxicab to another for use in transportation of passengers for hire before delivery of the taxicab with a transferred taximeter for inspection test and certification by the commissioner as provided in section 28-25.

28-27. The fee for each certificate of inspection shall be three dollars, but no charge shall be made for any certificate when the inspection and test is made upon complaint, and it is found that the taximeter is in proper working condition and accurately registers the lawful rates and charges.

28-28. It is unlawful to refuse any person transportation to any place within the city in any taxicab which is unoccupied by a passenger for hire unless it is on its way to pick up a passenger in answer to a call for service or it is out of service for any other reason. When any taxicab in answering a call for service or is otherwise out of

service it shall not be parked at a cabstand, and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of such taxicab.

28-29. Group riding is prohibited in taxicabs, except as directed by the passenger first engaging the taxicab. Not more than five passengers shall be accepted for transportation on any trip; provided that additional passengers under twelve years of age accompanied by an adult passenger shall be accepted if the taxicab has seating capacity for them.

28-29.1. No passenger shall be permitted to ride on the front seat with the chauffeur of the taxicab unless all other seats are occupied.

28-30. Rates of fare for taxicabs shall be as follows:

For the first one-quarter of a mile or fraction thereof for one person	25 cents
For each additional one-half of a mile or fraction thereof for one person	10 cents
For each additional person of twelve years or more for the whole trip	10 cents
For each three minutes of waiting time or fraction thereof	10 cents

Waiting time shall include the time beginning three minutes after call time at the place to which the taxicab has been called when it is not in motion, the time consumed by unavoidable delays at street intersections, bridges or elsewhere and the time consumed while standing at the direction of a passenger.

Every passenger under twelve years of age when accompanied by an adult shall be carried without charge.

Ordinary hand baggage of passengers shall be carried without charge. A fee of twenty-five cents may be charged for carrying a trunk, but no trunk shall be carried except inside of the taxicab.

Immediately on arrival at the passenger's destination it shall be the duty of the chauffeur to throw the taximeter lever to the non-recording position and to call the passenger's attention to the fare registered.

It is unlawful for any person to demand or collect any fare for taxicab service which is more or less than the rates established by the foregoing schedule, or for any passenger to refuse payment of the fare so registered.

28-31. Terminal vehicles shall not be used for transportation of passengers for hire except *from railroad terminal stations and steamship docks* to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan.

28-31.1. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;

4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner.

28-31.2. The rate of fare for local transportation of every passenger in terminal vehicles of the licensee shall be uniform, regardless of the distance traveled; provided that children under 12 years of age, when accompanied by an adult, shall be carried at not more than half fare. Such rates of fare shall be posted in a conspicuous place or places within each vehicle as determined by the commissioner.

28-32. Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined not less than $5.00 nor more than $100.00 for the first offense, not less than $25.00 nor more than $100.00 for the second offense during the same calendar year, and not less than $50.00 nor more than $100.00 for the third and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.